

² Respondent initially denied that claimant sustained an accidental injury arising out of and in the course of her employment. The ALJ decided that issue in claimant's favor and respondent does not contest that issue in this appeal. Thus, the only issue to be decided in this matter is the nature and extent of claimant's impairment.

cervical complaints coupled with a 10 percent to each upper extremity (for her carpal tunnel condition) which he converted to a whole body impairment, and combined using the combined values chart in the *Guides*³ resulting in the 16 percent finding.

The respondent requests review of this decision and alleges only that the ALJ failed to properly consider the opinions expressed by Dr. Fevurly. Respondent argues that had the ALJ not disregarded Dr. Fevurly's opinions, he presumably would have concluded claimant's permanent impairment was something less than the 16 percent.

Claimant argues that the Award should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Given the parties' stipulations and the presentation of this claim before the Board, the singular issue to be determined is not complicated. Four physicians have testified to various aspects of claimant's care and treatment following the assertion of this work-related claim. Dr. J. Mark Melhorn treated claimant for her bilateral carpal tunnel complaints and her neck and upper back complaints. Following a bilateral carpal tunnel release, claimant was then referred to Dr. Pat Do, who treated her neck and upper back complaints. Both physicians rated her respective conditions.

Counsel for both parties then referred claimant for additional evaluations in connection with this claim. Claimant's Attorney referred her to Dr. Michael Munhall who rated both her upper extremity complaints as well as the neck problems.

At respondent's request, Dr. Chris Fevurly examined claimant and issued his opinion as to her impairment. Dr. Fevurly expressed the view that claimant had no permanent impairment to either her upper extremities or her neck. He acknowledged that claimant has had bilateral carpal tunnel surgery, that she continues to suffer some symptoms in her upper extremities and that she also has problems in her neck. However, he found no objective symptoms on the date of his examination, other than the degenerative changes

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

he saw in an x-ray. He explained his decision as to why claimant did not qualify for an impairment rating this way:

. . . This is a lady who should really work with her employer and the employer needs to work with her to help her overcome her intolerance to the performance of her expected job duties. I think that's been the whole issue here the entire time. I think she complained bitterly to the employer and the employer refused to help her cope with the expected job demand and she became disgruntled about that and that's really what led to the claim. I mean, this problem should frankly never have been likely in the work comp system in my opinion.⁴

When specifically challenged about the applicability of a particular chart within the *Guides*⁵ and its application to claimant's carpal tunnel complaints, Dr. Fevurly challenged "anyone in the State of Kansas to have more knowledge than I as to what those *Guides* say in this section." He went on to explain that Table 16 (which was used by Dr. Munhall to rate claimant's bilateral carpal tunnel condition) was not applicable and in fact, had been removed from the *Guides* in later editions. However, he failed to explain precisely why that Table was not applicable. He agreed that *had* it been applicable, the 10 percent to each upper extremity was accurate. But that he viewed the Table as inapplicable, choosing instead to utilize Tables 11, 12 and 15, which yielded a zero percent impairment rating. Similarly, he conceded that if he had observed a spasm and dysmetria on the claimant's neck area on the day of his examination (as was seen in the examinations of other physicians) those clinical signs would justify a DRE II category assignment, which yields a 5 percent impairment to the whole body.⁶

After reviewing and summarizing the opinions of each of the physicians, the ALJ concluded as follows:

This Court finds the opinions of Dr. Melhorn, Dr. Munhall, and Dr. Do to be more persuasive than those of Dr. Fevurly. It is found by this Court, that adopting the opinions of Dr. Munhall and Dr. Do, that the [c]laimant has a five percent impairment of function to the body as a whole...⁷

He went on to find that claimant sustained a 10 percent functional impairment to each of her upper extremities and then combined those ratings with the 5 percent whole body impairment and ultimately assigned a 16 percent functional impairment.

⁴ Fevurly Depo. at 26.

⁵ All references are to the 4th ed. of the *Guides* unless otherwise noted. K.S.A. 44-510e(a) compels the physician to utilize the 4th edition for purposes of rating impairment, if the impairment is contained therein.

⁶ Fevurly Depo. at 44.

⁷ ALJ Award (Jul. 23, 2010) at 4.

Respondent appeals and succinctly framed its complaint in this appeal as follows:

The Administrative Law Judge in this [Award] takes into account three of the four physicians' opinions. Dr. Fevurly's opinion is not averaged in or factored into any of his calculations of impairment for permanent disability compensation. The only thing that Judge Clark says in his Award is that the opinions of Dr. Melhorn, Dr. Munhall and Dr. Do are "more persuasive than those of Dr. Fevurly". . . No rationale or reasoning (factually or legally) is given as to why Dr. Fevurly's opinions are totally ignored by the Court.

Respondent requests the Board to take into account the testimony and opinions of Dr. Fevurly in its analysis of the facts of this case.⁸

Contrary to respondent's assertion, the Board believes the ALJ did consider Dr. Fevurly's opinions. He summarized the contents of his deposition and after weighing his opinions against those offered by three other physicians, he concluded that he was not persuaded by Dr. Fevurly's position in this matter. And after reviewing the same evidence, the Board agrees with the ALJ's conclusion.

Dr. Fevurly's opinions are difficult to understand given the claimant's consistent and ongoing complaints of pain, the objective evidence of deterioration as seen in the x-rays, the fact that she has sustained nerve damage and had to undergo bilateral surgeries and even he concedes that the onset of her conditions is directly traceable to her work activities. He seems to take the unorthodox view that claimant should merely "work this all out" with her employer rather than to have pursued her rights under the workers compensation act. Just like the ALJ, the Board is wholly unpersuaded by Dr. Fevurly's opinions in this matter.

The Board also finds the ALJ's methodology in combining the two separately scheduled injuries to the upper extremities with the whole body impairment attributable to the neck injury to be appropriate.⁹ Accordingly, the ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated July 23, 2010, is affirmed.

⁸ Respondent's Brief at 2 (filed Aug. 25, 2010).

⁹ See *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986); *Goodell v. Tyson Fresh Meats*, 43 Kan. App.2d 717, 731 (2009).

IT IS SO ORDERED.

Dated this _____ day of October 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Robert G. Martin, Attorney for Self-insured Respondent
John D. Clark, Administrative Law Judge
Stacy Parkinson, Pro Tem Board Member